

THE WILDERNESS SOCIETY

IBLA 87-235

Decided December 8, 1988

Appeal from a decision of the Idaho State Director, Bureau of Land Management, approving the maintenance and reconstruction of stock watering reservoirs in the North Fork Owyhee River Wilderness Study Area. ID-16-40

Affirmed in part; set aside and remanded in part.

1. Rules of Practice: Appeals: Generally--Rules of Practice: Protests

Since, under 43 CFR 4.450-2, a protest is any objection to any action "proposed to be taken," a protest may not properly be filed where the action complained of has already taken place.

2. Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Timely Filing

The failure to file a timely notice of appeal under 43 CFR 4.411(c) deprives the Board of jurisdiction over the subject matter of the appeal. Where an individual who has appealed one decision issued by BLM attempts to raise matters that were finally decided in an earlier decision, which decision was not appealed, the appeal is not timely as to those prior matters which could have been appealed earlier.

3. Federal Land Policy and Management Act of 1976: Wilderness

The Interim Management Policy and Guidelines for Lands Under Wilderness Review are binding on all BLM State offices. No decision in conflict with the Interim Management Policy and Guidelines for Lands Under Wilderness Review may be sustained on appeal in the absence of an express justification in the record for the failure to follow the policy guidelines established by the Interim Management Policy and Guidelines for Lands Under Wilderness Review.

APPEARANCES: Thomas S. Robinson, Regional Director of the Wilderness Society, Boise, Idaho, and Janice L. Weis, Sierra Club Legal Defense Fund for appellant; Robert S. Burr, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Wilderness Society has appealed from a decision of the Idaho State Office, Bureau of Land Management (BLM), approving the maintenance and reconstruction of stock watering reservoirs in the North Fork Owyhee River Wilderness Study Area (WSA), ID-16-40. According to appellant, 1/ the decision on appeal was issued on October 6, 1986, and "deals with" eight reservoirs, located in two grazing allotments within the WSA.

In order to understand the issues presented by this appeal, it is first necessary to describe the development of these reservoirs in some detail. Two environmental assessments (EA's) were prepared to address the construction of seven new reservoirs and the maintenance of three existing ones in this WSA in 1982. It should be noted that, since the proposed reservoirs were to be constructed within a WSA, stringent guidelines, as delineated in the Department of the Interior Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP), published in the Federal Register on December 12, 1979 (44 FR 72014), as amended 48 FR 31854 (July 12, 1983), applied. Under the IMP, new permanent grazing improvements were only permissible "for the purpose of enhancing wilderness values by better protecting the rangeland in a natural condition." IMP III.H.3.d. (emphasis in original).

Additional specific limitations on the nature of such improvements were also expressly provided by the IMP. These will be more fully examined below. For our present purposes, suffice it to note that, by decision dated June 23, 1982, BLM approved EA ID-01-2-13, which provided for the construction of four reservoirs in the Pleasant Valley area, within the WSA. These four reservoirs were denominated as the Red Chain, the Lon Mills, the Pleasant Valley, and the Bedrock. On July 8, 1982, BLM approved EA ID-01-2-889, which involved the maintenance of three existing reservoirs in addition to the construction of three new reservoirs in the Nickle Creek area, also within the WSA. It does not appear that appellant challenged either of these decisions or the adequacy of either EA at that time.

A review of the documentation submitted with the case file shows that, despite an express reference in EA ID-01-2-13 to the requirement that all reservoirs be constructed to meet Visual Resource Management (VRM) Class I requirements, 2/ the four Pleasant Valley reservoirs, as originally

1/ The case file forwarded by BLM does not contain original documents, nor is it complete. Instead, the file consists of a map evidently prepared especially for this appeal and selected photocopied material, some of which is not dated and much of which is not in chronological sequence. Indeed, the file does not even contain a dated copy of the decision apparently under appeal. The letter BLM now treats as a decision appears only as an undated copy addressed to an individual with the notation that originals were mailed also to the Wilderness Society and another organization.

2/ Class I is, of course, the highest VRM rating. As the Visual Resource Inventory Handbook notes, "The objective of this class is to preserve the existing character of the landscape. This class provides for natural

constructed, clearly did not meet VRM requirements. See Memorandum dated November 14, 1983, from Outdoor Recreation/Wilderness Program Leader to the Assistant District Manager, Resources, Boise District Office, BLM. Thus, BLM embarked upon a program to rehabilitate these reservoirs. See, e.g., Memorandum dated October 29, 1984, from the Owyhee Area Recreation Planner to the Area Manager; Memorandum dated August 21, 1985, from Owyhee R.A. Recreation Planner to Wilderness Coordinator, Idaho State Office, BLM.

On September 3, 1985, appellant requested a progress report on the reservoir rehabilitation work. On December 6, 1985, the Owyhee Area Manager responded. The Area Manager admitted that "[t]he principal problem with the reservoir projects was that VRM Class I standards were not met from the key observation points (KOPs) due to the long, straight, linear forms of the dams and because of the poor finish work on the dams and in the impoundment areas." He noted that the dams on four of the seven new reservoirs (including the Red Chain reservoir) had been completely recontoured, though further hand tool work and reseeded would still be necessary. ^{3/} He agreed, however, that the remaining three reservoirs (Lon Mills, Pleasant Valley, and Bedrock) remained "visually unacceptable from the KOPs." The Area Manager invited representatives of appellant to accompany BLM on a future field inspection of the reservoirs to obtain the benefit of their perspective.

By letter dated May 21, 1986, the Regional Associate of the Wilderness Society noted that she had flown over a number of Idaho WSA's the previous week and was particularly upset by the nine reservoirs which had been built in the North Fork WSA. ^{4/} She voiced her objections to the method in which the original decision to construct the reservoirs was made, arguing that it violated the National Environmental Protection Act (NEPA), 42 U.S.C. § 4321 (1982), the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(c) (1982), and the IMP. She argued that "[a]t this point in time it is critical to determine what needs to be done to reclaim the WSA and to identify what decisions/actions should be precluded from occurring in the future and why." She ended the letter by requesting a meeting with the appropriate BLM officials.

fn. 2 (continued)

ecological changes; however, it does not preclude very limited management activity. The level of change to the characteristic landscape should be very low and must not attract attention." Visual Resource Inventory Handbook, 8410-I, at V.B.1.

^{3/} Actually, the letter referred to five of eight reservoir projects. The Area Manager included in his discussion the Boni Reservoir, located within the Nickel Creek Table, which had been in existence prior to the establishment of the WSA.

^{4/} This reference to nine reservoirs "built" in the North Fork WSA pursuant to the 1982 authorization is somewhat confusing. A total of 10 reservoirs actually exist within the WSA, but 3 of these were in existence prior to the 1982 decision.

A memorandum dated July 7, 1986, from the Owyhee Recreation Planner to the Owyhee Area Manager, reported on the results of a 2-day field investigation of the reservoirs in the WSA. This report noted:

[E]ach of these reservoirs were built to a size that flooded areas substantially beyond the original ephemeral pond sites and/or created ponds of considerable depth (up to 10 feet deep). Each of the dams exceeds 15 acre-feet of storage with surface acreages at maximum pool of three to 5 acres or more. The configuration of all four dams remains straight because water levels have never been low enough to permit complete recontouring.

The memorandum additionally noted that "only the Red Chain Reservoir comes close to meeting VRM Class I standards necessary to ensure quality wilderness values in the Pleasant Valley Table area as a whole," but also pointed out that this reservoir "clearly violated the 10 acre-foot rule of the IMP."

Specific courses of action were recommended with respect to all four reservoirs. In summing up the conclusions reached, the memorandum noted:

It remains my opinion that the Pleasant Valley Table reservoirs' numbers and distribution are such that they remain substantially unnoticeable in the Pleasant Valley Table area as a whole. The Red Chain Reservoir is the most visible of all reservoirs in the North Fork WSA but it generally appears as a natural lake from most locations. The remaining three reservoirs have a serious problem with meeting VRM Class I standards. Without appropriate action to mitigate their close-in visual impacts, these reservoirs will continue to degrade the quality of the wilderness experience. Though it is expected that the average "casual observer" would encounter only one of these reservoirs in a hike across the plateau, the encounter would be visually unsatisfactory. The dams are not constructed in a manner expected of man-made structures in a wilderness area. The shape of the dam/reservoir is the fact to consider. The size of the reservoirs is a technical violation of the IMP but size has little to do with the visual problems associated with the dams nor how they affect wilderness quality on the WSA as a whole.

Apparently, a further field review of the reservoir project, in which the Regional Director of the Wilderness Society participated, was subsequently conducted. Based on this review, the District Office informed the Regional Director of the Wilderness Society that certain specific rehabilitation work would be conducted on all of the reservoirs within the WSA, to be completed by November 1, 1986. Of particular relevance to the instant appeal, the District Office proposed the following actions with respect to the four Pleasant Valley Reservoirs:

1. Red Chain Reservoir (T. 10 S., R. 5 W., Sec. 12) - Lower the height of the dam's spillway approximately two (2) feet; move the spillway eastward approximately one-third (100 feet) the length of the dam. The extra dam material would be used to

recontour the remaining dam structure. Dirt would be placed on the front side of the dam to further soften the slope. The eastern end of the dam would be flared in a southerly direction to blend with the contours of the hill or knoll to the east of the reservoir. The dam's top would be made so as to taper downward toward the west, making it further blend into natural topographic features. A trenched spillway would have to be made in front of the west side of the dam to direct water away from the dam and into the natural stream channel. It is anticipated that the above actions would reduce the "high pool" surface acreage of the reservoir to about one-third (three acres) its original size. The dam and backwater would be seeded with Idaho fescue/bluebunch wheatgrass, sagebrush and rushes/sedges as appropriate.

2. Lon Mills Reservoir (T. 10 S., R. 4 W., Sec. 17) - Pump or siphon the reservoir to as dry a condition as possible; open the dam up and place a pipe system in the dam to allow water to flow into a trough system approximately 1/2 mile downstream. With the pipe placement, soften the contours of the dam and backwater area where necessary. Seed the dam and other disturbed areas with Idaho fescue/bluebunch wheatgrass, sagebrush and rushes/sedges as appropriate. Fence the reservoir and dam to exclude livestock. The fence would be constructed with stiles for public access. Cut out and burn dead standing trees and burn remainder of existing felled tree debris.

3. Bedrock Reservoir (T. 10 S., R. 5 W., Sec. 1) - Actions would be as described for Lon Mills Reservoir except the Bedrock Dam would be recontoured into a crescent shape. Breaching this dam may be an option to pumping or siphoning out the water.

4. Pleasant Valley Reservoir (T. 10 S., R. 4 W., Sec. 5) - Pump, siphon, or breach the dam to dry out the water impoundment area; significantly bend or turn in the ends of the dam in an upstream direction to create a half-circle or tear drop shape. Reshape the water impoundment area to eliminate the several "squared off areas" and cut/burn the dead standing trees. Lower the spillway on the dam to reduce the surface acreage of the reservoir by about one-half its original size. Seed the dam and backwater areas to Idaho fescue/bluebunch wheatgrass, sagebrush and rushes/sedges as appropriate.

The letter proposing the above actions closed with a request that appellant provide comments on the proposed actions as soon as possible as work would have to begin by mid-August.

By letter dated July 31, 1986, the Regional Director of the Wilderness Society responded to the recommendations. While noting that "[f]or the most part, I do not have any problem with what you have proposed in your letter," he cautioned the District office that appellant continued to believe that "cattle numbers are going to have to be cut as was suggested in the Final Owyhee Grazing EIS."

Copies of the July 23, 1986, recommendations were also sent to other interested parties, including the Glens Ferry Grazing Association and individuals holding Federal grazing permits. The record before the Board indicates that at least one of the Federal permittees protested the proposed action. Indeed, a document described as an administrative appeal was filed with the District Manager alleging, inter alia, violations of FLPMA and the grazing permit.

Subsequently, by letter dated October 6, 1986, the State Director, Idaho State Office, informed appellant of the course of action which would be undertaken. Appellant was expressly informed that "[t]his will supersede and modify our letter dated July 23, 1986, on this subject."

The October 6 letter dealt only with the Pleasant Valley reservoirs. The course of action outlined, however, varied considerably from that proposed in the July 23 letter. In order that this variance may be clearly understood, we will set out, in toto, the new prescriptions devised for remedying the problem:

At Red Chain Reservoir, the height of the dam's spillway will be lowered approximately one-half foot. The eastern end of the dam would be flared in a southerly direction to blend with the contour of the hill to the east. A spillway would have to be trenched in front of the west side of the dam to direct water away from the dam and into the natural stream channel. The spillway would be shallow and curved as appropriate to blend with the appearance of the natural stream channel. Dirt would be placed on the front side of the dam to further soften the slope. All of the fill material would come from within the impoundment area. By lowering the surface of the reservoir by one-half foot and removing fill material from within the impoundment area, it is anticipated the amount of water remaining in the reservoir will not be reduced more than ten percent. Presently, Red Chain Reservoir contains approximately 46 acre feet of water at high pool and inundates 22 surface acres. Rip-rap will be placed on the face of the dam to reduce the erosion being caused by wave action.

At Pleasant Valley Reservoir, we will bend, or turn, the ends of the dam in an upstream direction to create a half-circle, or teardrop, shape. Also, we will reshape the impoundment area to eliminate the several "squared off areas," and cut/burn the dead standing trees. Material to be used in shaping the dam will come from within the impoundment area. After construction, the reservoir will continue to hold approximately the same amount of water, which is estimated to be 24 acre feet. Surface acreage will be significantly reduced from 12.1 acres to approximately seven acres.

On Lon Mills Reservoir, the original dam will be left intact. Material will be removed from the impoundment area to add to the downstream side and northern tip of the dam. This addition will substantially "soften" the appearance of the dam, rehabilitate

the borrow pit on the downstream side of the dam, and make the dam appear as a natural extension of the terrain on the north side of the reservoir site. The spillway will also be stabilized with additional rock material taken from the north slope borrow pit area. Dead trees in the impoundment area will be cut and burned.

On Bedrock Reservoir, the same procedures will be followed as proposed for Lon Mills Reservoir, including the rehabilitation of disturbed areas on the north side of the impoundment area. Excessive rock material in the existing spillway will be used to help landscape the downstream side of the dam. There will be no construction of fence enclosures or installation of pipelines and troughs on either Lon Mills or Bedrock Reservoirs.

The State Director justified his failure to require a reduction in the existing storage capacity of the reservoirs as follows:

In my opinion, retaining these reservoirs at their existing storage capacity will allow better distribution of livestock, and will ensure the objectives of the grazing plan are accomplished. Also, additional benefits to antelope and waterfowl are occurring because of the permanent water availability. It is my opinion once the dams are rehabilitated to meet visual Class I rating, the cumulative impact of size, number, color, and materials will not significantly constrain the Secretary of the Interior's recommendation with respect to the North Fork Wilderness Study Area's suitability or unsuitability for preservation as Wilderness.

Upon receipt of the State Director's new decision as to the rehabilitation actions to be undertaken, appellant filed the appeal which is presently before the Board.

At the outset, it is important to note that the first question which must be faced is the scope of the present appeal. Appellant has characterized its appeal as a challenge to the BLM decision "to develop numerous reservoirs in the North Fork of the Owyhee WSA," arguing further that the decision being appealed deals with eight reservoirs (Statement of Reasons (SOR) at 1). Moreover, the overwhelming bulk of appellant's SOR on appeal is directed to an attack on the original decision to construct these reservoirs. A review of the record, however, clearly establishes that the decision being appealed was strictly limited to the four Pleasant Valley reservoirs and did not involve the question of whether or not they should be constructed but how they should be rehabilitated to accord with the IMP and the original 1982 decision authorizing their construction. To the extent that appellant is attempting to use the present appeal as a vehicle in which to reopen the question of whether these reservoirs should have been built in the first instance, its challenge is simply untimely.

[1] In the first place, the propriety of the construction of these reservoirs is no longer open to protest under 43 CFR 4.450-2. That regulation permits any interested party to protest action "proposed to be taken" by BLM. In the instant case, construction of the reservoirs in

question had not only been authorized years prior to appellant's objections, the reservoirs had actually been built years before the instant appeal was filed. Thus, BLM's decision to proceed with the construction of these reservoirs was not subject to being protested in 1986. See Goldie Skodras, 72 IBLA 120 (1983).

[2] Nor is BLM's decision to proceed with the construction of these reservoirs within the WSA subject to appeal at this late date. The applicable regulation, 43 CFR 4.411(a), provides, in relevant part:

A person who wishes to appeal to the Board must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal. A person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service.

The regulations further expressly note that no extension of time will be granted for the filing of a notice of appeal. 43 CFR 4.411(c).

The Board has consistently held that the timely filing of the notice of appeal is jurisdictional and that failure to file a notice of appeal within the time allowed requires dismissal of an appeal. See, e.g., James C. Mackey, 96 IBLA 356, 94 I.D. 132 (1987); Shelley Anne Trainor, 21 IBLA 326 (1975).

The record before the Board is unclear as to whether or not appellant was notified of the decision to construct the reservoirs in 1982. What is clear, however, is that appellant was aware that the reservoirs had been constructed no later than September 3, 1985, more than a year prior to the filing of the instant notice of appeal. Under the applicable regulations, if appellant desired to challenge the decision to construct these new reservoirs it was required to commence its appeal no later than within 30 days of when it became aware that the reservoirs had been built. ^{5/} This appellant did not do. Therefore, the correctness of the original decision to build the reservoirs, as well as all subsidiary questions relating to the adequacy of the EA's prepared in support thereof, is beyond the purview of the present appeal.

Moreover, while the October 6, 1986, decision under appeal did dramatically modify the rehabilitation prescription for the Pleasant Valley reservoirs, it did not purport, in any manner, to change the July 23, 1986, decision with respect to the Nickel Creek reservoirs. Appellant never filed

^{5/} In light of our disposition of this question, it is unnecessary to decide to what extent constructive knowledge of an action properly imputed to a party would vitiate the necessity of actual knowledge of the action, or in what circumstances laches might apply where an action is being challenged long after it has, in fact, occurred.

an appeal from that decision. Therefore, the proposed activities on the Nickel Creek reservoirs are not involved in the present appeal.

Thus, the sole matter within the scope of the present appeal is the plan of action for the rehabilitation of the Pleasant Valley reservoirs. While, as we have indicated, a comparison of the July 23, 1986, decision with that rendered by the State Director on October 6, 1986, shows a marked change in the level and scope of restoration activities contemplated, a review of appellant's statement of reasons shows that, insofar as rehabilitative actions are concerned, it has assailed only the excess storage capacity and surface acreage of the reservoirs, particularly the Red Chain and Pleasant Valley reservoirs.

Under the July 23 decision, the Red Chain reservoir, with a present storage capacity of approximately 46-acre feet of water and a surface extent of about 22 acres, was to have the spillway lowered approximately 2 feet with the spillway being moved eastward approximately 100 feet. These actions would have led to a substantial reduction of both the surface and total storage capacity. Under the October 8 decision, the height of the spillway was to be lowered only one-half foot, and the spillway was not to be moved eastward. This decision expressly noted that "the amount of water remaining in the reservoir will not be reduced more than 10 percent."

With respect to the Pleasant Valley reservoir, the July 23 decision proposed reducing the surface acreage in half by lowering the spillway, though it was unclear how much of a total storage capacity decline would result. The October 8 decision also purported to lower the surface acreage but expressly noted that there would be no lessening of the amount of water within the reservoir, which was estimated to be approximately 24-acre feet.

Appellant asserts that both of these reservoirs exceed the size requirements established in the IMP. Appellant is correct. The IMP clearly provides that reservoirs constructed within WSA's "should be no larger than necessary, and not to exceed 10 acre feet in storage capacity." See IMP at III.H.4.d. 6/ Yet, it is apparent that the decision of the State Director

6/ We note that the new Handbook concerning Interim Management Policy and Guidelines, H-8550-1, inexplicably varies from the original IMP language cited in the text. Thus, the Handbook provides that reservoirs "should be no larger than necessary, and not to exceed 10 surface acre feet in storage capacity." (Emphasis supplied.) For the reasons which follow, we have determined that the addition of the word "surface" in the above quotation was the result of an editorial oversight.

First, in the accompanying explanation of the material transmitted, it was noted that "This Handbook simply places the Wilderness Interim Management Policy, as first published in a document of the same name on December 12, 1979, and a revision dated July 12, 1983, into Handbook format and makes it a permanent part of the BLM's directive management system." Since the language of III.H.4.d. was not amended by the July 12, 1983, revision, it is clear that no substantive change was intended.

contemplates leaving both the Red Chain and the Pleasant Valley reservoirs far in excess of this limit. On the basis of the present record, this course of action is simply not sustainable.

[3] We have noted in the past that policy directives emanating from the BLM Directorate are binding on all State Offices. See, e.g., Raymond A. Berry, 35 IBLA 386 (1978); Margaret A. Ruggiero, 34 IBLA 171 (1978). With particular reference to the IMP, we have noted that this document "governs BLM's management of WSA's." L. C. Artman, 98 IBLA 164, 168 n.6 (1987). Thus, the State Office was required to follow the guidelines set forth in the IMP. The fact that the State Office might have viewed the violation of the 10 acre-foot limitation with respect to new reservoirs within a WSA as constituting only a "technical" violation is an irrelevancy. The State Office was still required to give force and effect to the specific limitations found in the IMP.

We recognize, of course, that the provisions of the IMP are in the nature of guidelines and are not intended to necessarily provide inflexible constraints which cannot be modified. Nevertheless, neither can the guidelines be said to be mere hortatory exhortations which may be accepted or rejected as the individual policy-maker sees fit. Rather, where a variance between the guidelines and the action contemplated exists it is incumbent upon the decision-maker to clearly delineate the area of the conflict and expressly justify any variance from the IMP. Obviously, where, as here, the degree of variance is great, so, too, should be the justification. In the instant case, however, there has simply been no attempt, whatsoever, to explain why reservoirs substantially in conflict with the guidelines are not being reconstructed so as to conform not only to the IMP but to the EA's under which their construction was authorized. The mere fact that these over-sized reservoirs permit increased water availability for grazing purposes does not justify their continued existence within the WSA, since the only reason they were constructed in the first place was to "enhance wilderness values by better protecting the rangeland in a natural condition." The present variances can only be justified, if at all, by an analysis which shows that these departures from the norm, themselves, "enhance wilderness values."

Therefore, since the rehabilitative program under review herein does not contemplate reducing the size of the Red Chain and Pleasant Valley

fn. 6 (continued)

Second, since both the original IMP and the July 12, 1983, revisions were published in the Federal Register, it is clear that BLM would have similarly treated any amendments of substantive scope.

Third, as a practical matter, the phrase "10 surface acre feet" is meaningless. Surface acreage is, of course, a measure of areal extent, while acre-feet is a measure of volume. Thus, the phrase "10 surface acre feet" is little more than a confused jumble of words.

In view of the foregoing, it is clear that the operative policy directive remains that originally set forth in the IMP, viz., new water impoundments are not to exceed 10 acre-feet in storage capacity.

reservoirs to the 10 acre-foot limitation prescribed by the IMP, and this failure is not justified in the record before the Board, the decision must be set aside and remanded for further consideration. If BLM should once again determine not to reduce the present size of these two reservoirs it must justify its decision within the context of the IMP. Insofar as other rehabilitative actions described in the October 8 decision are concerned, appellant has failed to show that they are either contrary to the IMP or will not aid in rectifying the existing violations of the applicable VRM standards which all parties involved in this appeal recognize. Therefore, the prescribed course of action for the Lon Mills and Bedrock reservoirs is hereby affirmed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Idaho State Office is affirmed as to the Lon Mills and Bedrock reservoirs and set aside and remanded for further action with respect to the Red Chain and Pleasant Valley reservoirs.

James L. Burski
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

